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ABSTRACT

This chapter includes all cases involving student-athletes, coaches, athletic directors, athletic associations, booster organizations, sports programs and events, and sports facilities and equipment at both the K-12 and higher education levels. However, no case law is discussed that pertains to physical education instruction or intramural participation. The cases are discussed in the following sections: (1) eligibility; (2) equality of programs; (3) enforcement of rules; (4) tort; (5) employment; (6) contract disputes; (7) discrimination; (8) First Amendment issues; and (9) miscellaneous. (MLF)

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SPORTS

Linda A. Sharp

Introduction / 156
Eligibility / 156
- Discipline / 156
- Academic Issues / 157
- The Eight Semester Rule / 157
- Limitation on Years of Eligibility / 158
- Transfer / 158
- Drug Testing / 159

Equality of Programs / 159
- General / 159
- Girl to Play on Boys' Team / 160
- Boy to Play on Girls' Team / 160

Enforcement of Rules / 161
- Probation/Sanction / 161

Tort / 162
- Intentional / 162
  - Reckless Misconduct / 162
  - Defamation / 162
  - Educational Exploitation / 163
- Negligence / 163
  - Participants / 163
  - Spectators / 166

Employment / 167
- Adverse Employment Decisions / 167
  - General / 167
  - Refusal to Renew Coaching Contract / 168
  - Resignation / 168
  - Neglect of Duty / 169
- Contract Disputes / 169
- Discrimination / 170
  - Race / 170
  - Sex / 171
- First Amendment Issues / 172

Miscellaneous / 173

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EA 021 706

Public Records / 173
Collective Bargaining / 174

INTRODUCTION

This Chapter includes all cases, at either the K-12 or higher education levels, which deal with student-athletes, coaches, athletic directors, athletic associations, and booster organizations. It also includes all cases, at those levels, which involve sports programs and events and/or sports facilities and equipment. However, no case law is discussed which pertains to physical education instruction or intramural participation.

ELIGIBILITY

This section contains ten cases: three involved students who were ineligible to participate because of misconduct; two were ruled ineligible because of academic difficulties; one questioned the eight-semester rule; one petitioned for an additional year of eligibility; two students found transfer rules objectionable; and one case dealt with the issue of drug testing as a prerequisite to athletic participation.

Discipline

In a case out of Kentucky, high school members of the baseball team violated school rules by drinking alcohol at a school sponsored event. The students were given five-day suspensions from school and extracurricular activities. The students sought a preliminary injunction from the district court on the basis that there was an infringement of their substantive due process rights. The court denied the injunction on the basis that the length of the suspension was not unreasonable in view of the infraction in question.[1]

A federal district court in New Jersey heard the case of a high school football player who was suspended from participating in extracurricular activities for sixty days. His admitted offense was smoking marijuana and drinking beer on school property. After hearing arguments in which the student claimed an infringement of his property interest in playing football, the court granted summary judgment for the school district. Under New Jersey law, there is no constitutionally protected property interest in extracurricular activities.[2]

1. Katchak v. Glasgow Indep. School Sys., 690 F. Supp. 580 (W.D. Ky. 1988).
2. Palmer v. Merluzzi, 689 F. Supp. 400 (D.N.J. 1988).

In a federal district court in Kansas, a former high school head cheerleader sued after she was removed from her position. Although the student had informed the principal and superintendent that she would be absent for a period of time while she went to Nashville to record an album, the cheerleader sponsors nonetheless removed her from the squad. The suit was brought on two bases: (1) she alleged an infringement of her property interest in the head cheerleading position; and (2) she alleged a denial of first amendment rights since she was ostensibly removed after she exercised her right to free speech (i.e., her singing performance in Nashville). The court granted the school district's motion to dismiss. There is no constitutionally protected property interest in cheerleading and there was no evidence to suggest that her "free speech" rights led to her removal.[3]

Academic Issues

A Louisiana Court of Appeals reviewed a case in which a high school student was barred from trying out for the cheerleading squad because of her inability to meet the requisite 1.6 grade point average. The lower court granted a permanent injunction allowing the student to participate. The court of appeals reversed on the basis that there was no violation of equal protection even though the required grade point average for team sports was only 1.5. The court found that the rule was rationally related to the promotion of academic excellence.[4]

In a Kansas case, a high school football player challenged the constitutionality of a "no make-up" rule which prohibited students from making up failed classes after the semester in order to regain academic eligibility. The Kansas Court of Appeals reversed the lower court which had granted an injunction to the player. The right to participate in extracurricular activities is not a fundamental right and the rule met the rational basis test. It encourages students to study and is not overly harsh in that students can enroll in six or seven classes a semester and need only pass five to participate.[5]

The Eight Semester Rule

A student, solely for academic reasons, repeated the eleventh grade. The student was then prevented from participating in athletics by the California Interscholastic Federation rule which placed an eight semester limitation on athletic eligibility. The Court of Appeals of California found that this rule was rationally related to averting situations where

3. Haverkamp v. Unified School Dist. No. 380, 689 F. Supp. 1055 (D. Kan. 1988).
4. Rousselle v. Plaquemines Parish School Bd., 527 So. 2d 376 (La. Ct. App. 1988).
5. Stone v. Kansas State High School Activities Ass'n, Inc., 761 P.2d 1255 (Kan. Ct. App. 1988).

teams of more veteran athletes would gain an unfair competitive advantage over schools whose athletes progressed normally through the system. Thus, the court of appeals reversed the superior court which had granted a preliminary injunction for the student.[6]

Limitation on Years of Eligibility

In a case out of Arizona, a student challenged the state interscholastic association's rule which denied the student an additional year of eligibility. The student believed that he should fall within that part of the rule which allows an additional year of eligibility for "illness." In this situation, however, the student's "illness" related to incarceration in a juvenile institution after he committed burglary to get money to support his drug addiction. The Arizona Court of Appeals found that just as addiction does not excuse criminal acts neither does it make incarceration an absence due to "illness" within this situation. Thus, the injunction granted by the lower court was vacated.[7]

Transfer

In an Indiana case, a student transferred from a small private high school to a larger parochial school. The transfer was made to broaden the student's horizons and she did not transfer for reasons relating to her participation in interscholastic volleyball. Nonetheless, she was automatically prevented as a transfer student from participating in interscholastic athletics for one year after her transfer. The student sought an injunction from the federal district court under section 1983. After an extensive analysis of the law as it pertains to "state action," the district court found that the conduct of the IHSAA was not state action.[8] The court looked at the precedent from the United States Supreme Court in *Rendell-Baker v. Kohn*[9] and *Blum v. Yaretsky*[10] as well as a Fourth Circuit Court of Appeals case which dealt specifically with the issue of the NCAA and state action.[11] In particular, the district court found the reasoning of this last case "equally applicable to high school athletics and the IHSAA."[12]

A no transfer policy which was in force to balance enrollments between two high schools was challenged by a student who was pre-

6. California Interscholastic Fed'n v. Jones, 243 Cal. Rptr. 271 (Ct. App. 1988).
7. Clay v. Arizona Interscholastic Ass'n, Inc., 757 P.2d 1059 (Ariz. Ct. App. 1988).
8. Anderson v. Indiana High School Athletic Ass'n, 699 F. Supp. 719 (S.D. Ind. 1988).
9. Rendell-Baker v. Kohn, 457 U.S. 830 (1982).
10. Blum v. Yaretsky, 457 U.S. 991 (1982).
11. Arlosoroff v. NCAA, 746 F.2d 1019 (4th Cir. 1984).
12. Anderson v. Indiana High School Athletic Ass'n, 699 F. Supp. 719, 726 (S.D. Ind. 1988).

vented by the policy from attending the high school of her choice which had the swim team and coach under whom she wished to train. The rule was put into place to prevent an imbalance in enrollment which would interfere with the school district's ability to offer equal educational opportunities at each school. Additionally, if one of the school's enrollment dropped below a certain number, that school would lose its status as a Class A school for athletic competition. The Michigan Court of Appeals found that there was a rational basis for this no transfer policy and affirmed the lower court's judgment for the school district.[13]

Drug Testing

In this case out of Indiana, a drug testing program to be applied to all students who wished to participate in interscholastic athletics was found not to violate the constitutional rights of the student-athletes. Eligibility to participate in varsity athletics was conditioned upon the student-athlete's consent to random urinalysis drug testing. The federal district court denied the request for an injunction to prohibit the application of this system.

Although the court did consider the drug testing to be a search within the meaning of the fourth amendment, it also considered the testing to be "reasonable." The school's interest in maintaining a drug-free athletic program for the health and safety of participants is an important governmental interest which is furthered by drug testing. The school authorities were within their discretion in singling out athletes for the drug testing program since they have a unique standing in the school and participation in school athletics is a privilege, not a constitutionally protected right.[14] The Seventh Circuit Court of Appeals affirmed the district court's decision.[15]

Equality of Programs

General

A class of women student-athletes brought suit against Temple University for alleged sex discrimination in the administration of its athletic programs. The federal district court denied the university's motion for summary judgment. First, there was a material issue of fact as to whether the evidence that only one-third of the participants in intercollegiate athletic programs were women indicated gender discrimination. Second,

13. Palmer v. Bloomfield Hills Bd. of Educ., 417 N.W.2d 505 (Mich. Ct. App. 1987).
14. Schaill v. Tippecanoe County School Corp., 679 F. Supp. 833 (N.D. Ind. 1988).
15. Schaill v. Tippecanoe County School Corp., 864 F.2d 1309 (7th Cir. 1988).

based on its interpretation of the *Grove City College v. Bell* decision,[16] this court held that athletic scholarships are a part of a university's financial aid program thus bringing the intercollegiate athletic program within the ambit of title IX.[17]

In a case from Montana, female athletes complained of sex discrimination in secondary school programs. The case was dismissed pursuant to a settlement agreement which was arrived at with the assistance of a facilitator. However, the federal district court retained continuing jurisdiction to enforce the agreement. Thereafter, the plaintiffs alleged that the agreement was violated since the high school association did not take action to align the girls' basketball and volleyball seasons with the national norm. The court found for the defendants.[18] The Ninth Circuit Court of Appeals affirmed this decision on the basis that the "law of the case" did not mandate the change of seasons.[19]

Girl to Play on Boys' Team

In a federal district court case from Nebraska, a female high school sophomore sought a restraining order to prevent the high school activities association from refusing her permission to wrestle on the high school boys' team. The district court granted her a temporary restraining order since the court failed to find a substantial relationship between the rule prohibiting females from the wrestling team and the asserted goal of protecting the health and safety of female students. In this case the rule operated on the assumption that females are innately inferior and no evidence was presented to show that this plaintiff was incapable of safely participating with male wrestlers.[20]

Boy to Play on Girls' Team

A male who wished to participate on the girls' interscholastic volleyball team obtained preliminary injunctive relief from a district court in Colorado allowing him to participate. However, the Tenth Circuit Court of Appeals reversed on the basis that the lower court had erroneously applied an overly stringent test for gender-based discrimination.[21]

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16. Grove City College v. Bell, 465 U.S. 555 (1982).

17. Haffer v. Temple Univ., 617 F. Supp. 517 (E.D. Pa. 1987); *See* The Yearbook of Education Law 1988 at 183, Haffer v. Temple Univ., 115 F.R.D. 506 (E.D. Pa. 1987).

18. *See* The Yearbook of School Law 1987 at 182, Ridgeway v. Montana High School Ass'n, 633 F. Supp. 1564 (D. Mont. 1986).

19. Ridgeway v. Montana High School Ass'n, 858 F.2d 579 (9th Cir. 1988).

20. Saint v. Nebraska School Activities Ass'n, 684 F. Supp. 626 (D. Neb. 1988).

21. Rowley v. Members of the Bd. of Educ. of St. Vrain Valley School Dist., 863 F.2d 39 (10th Cir. 1988).

ENFORCEMENT OF RULES

Probation/Sanction

In a case out of Washington, a female track athlete filed suit against the University of Washington challenging the constitutionality of the drug testing plan. The Superior Court of Washington enjoined the drug testing. The university brought in the NCAA as a third party defendant and the NCAA removed the case to the federal district court. The district court ruled in favor of the NCAA.[22] The Ninth Circuit Court of Appeals has now addressed the issue of whether the case was properly removed to federal court. It ruled that the university's third party complaint against the NCAA was a matter of state law. Furthermore, the NCAA cannot assert diversity of citizenship jurisdiction. Therefore, the matter has been remanded to the district court with directions that this court remand the entire case back to the state court.[23]

In the wake of the "death penalty" against Southern Methodist University because of extensive NCAA violations, University alumni, football players, and cheerleaders brought suit against the NCAA for the violation of antitrust and civil rights laws. The plaintiffs alleged that the violations occurred in the enforcement of NCAA rules which limit the compensation which football players may receive to scholarship monies. The restriction on allowable compensation was, in the plaintiffs' view, price fixing in violation of the Sherman Act. The federal district court dismissed the complaint. The Fifth Circuit Court of Appeals found that the alumni and cheerleaders lacked standing to pursue the antitrust claim. Although the court held that the football players "may" have standing, they lost on the merits of the claim. The civil rights claims were disposed of on the basis that the NCAA was not a state actor.[24]

The plaintiffs in this case out of Kansas are a number of black football players who alleged that they were being treated in a racially discriminatory manner by the university coaching staff and administration. The players boycotted practices as a protest of their treatment and they were subsequently removed from the team. However, their athletic scholarships were not taken away from them. In their suit in a federal district court, the plaintiffs alleged that their freedom of speech rights were infringed upon and that their liberty and property rights were also violated. The court held that there was no infringement of their property rights since they did not lose their scholarships. There is no property interest in the right to play football, only in the right to receive scholarship funds. Thus, the defendant's

22. *See* The Yearbook of Education Law 1988 at 185, O'Halloran v. University of Wash., 672 F. Supp. 1380 (W.D. Wash. 1987).
23. O'Halloran v. University of Wash., 856 F.2d 1375 (9th Cir. 1988).
24. McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988).

motion for summary judgment was granted in regard to this issue. However, the court refused to grant summary judgment regarding the issue of the infringement of the players' free speech rights.[25]

Howard University sought a restraining order against the NCAA for denying it a postseason berth in the Division I-AA football tournament. The plaintiff alleged that the NCAA failed to follow its own guidelines in the selection of teams to postseason play and unfairly excluded the plaintiff university. Although the plaintiff demonstrated that it may prevail on the merits, a restraining order was not warranted because of the risk of substantial harm to other schools who were already at the sites of the postseason contests.[26]

TORT

In 1988 there were seventeen tort cases dealing with sport. Of these cases, four were intentional torts. One case dealt with reckless misconduct; two were defamation cases; and one case involved educational exploitation. Of the thirteen negligence cases, ten dealt with participants and three concerned spectators.

Intentional

Reckless Misconduct. The plaintiff sustained paralyzing injuries in a lacrosse game after he was flipped over the back of the defendant, an opposing player. The plaintiff grabbed the defendant from the back and held him in a bear hug after the defendant stood over one of the plaintiff's teammates taunting him. In response to the plaintiff's bear hug, the defendant threw the plaintiff over his back. An earlier Ohio Supreme Court decision dealt with issues of the agency relationship between the defendant and his University.[27] In this court of appeals decision, the issue was the duty owed by the defendant to the plaintiff in this situation. The court viewed the actions of the defendant to be reflexive and instinctive. As such there is no liability for actions between players which do not rise to the level of an intentional tort. In this court's view an intentional tort is defined as a "specific and perverse intent to cause physical injury to another separate and apart from the heat of the contest."[28]

Defamation. A high school football coach brought a libel action against a newspaper for reports of the coach's alleged behavior during and after a football game. The reports related to verbal abuse by the coach

25. Hysaw v. Washburn Univ. of Topeka, 690 F. Supp. 940 (D. Kan. 1987).
26. Howard Univ. v. NCAA, 675 F. Supp. 652 (D.D.C. 1987).
27. *See* The Yearbook of School Law 1987 at 186, Hanson v. Kynast, 494 N.E.2d 1091 (Ohio 1986).
28. Hanson v. Kynast, 526 N.E.2d 327 (Ohio Ct. App. 1987).

including profanity directed toward his quarterback. A trial court returned a verdict for the coach in both compensatory and punitive damages. The Supreme Court Appellate Division negated the award of punitive damages and upheld the compensatory damage award.[29] On appeal to the Court of Appeals of New York, the matter was reversed. The coach failed to carry his burden of establishing actual malice. A "misunderstanding" by the reporter of the content of the coach's comments to his quarterback is insufficient to establish actual malice.[30]

In a Minnesota case, a high school tennis coach sued a rival coach, a newspaper columnist, and a newspaper for libel. The defendant coach allegedly told the defendant columnist that the plaintiff had cheated in a tennis match by playing a team member in a position other than her ranked position, a violation of the tennis rules. On the day in question, plaintiff's number one ranked player was put in the number two slot. The lower court found for the defendants. The court of appeals affirmed this decision on the basis that the defendant's statement was true and thus could not be defamatory.[31]

Educational Exploitation. In a Michigan case, a complaint was brought against a city board of education and an Idaho junior college to recover for the alleged exploitation of a student's athletic talent in basketball in derogation of the defendants' duties to further the student's education. A high school student who was in special education classes for slow learners was allegedly transferred to regular classes so that the student could participate in basketball. He graduated from high school even though he was illiterate. He then attended an Idaho junior college where he was to be "academically carried" for two years before he would transfer to a four year school. While at the junior college, he suffered a complete nervous breakdown because he was subjected to ridicule by a number of students who discovered his illiteracy. The Michigan Court of Appeals found that the Idaho junior college was not subject to jurisdiction in Michigan. Furthermore, the school board had governmental immunity since high school sports are a part of the secondary education process which is a governmental function.[32]

Negligence

Participants. The mother of a football player who became ill at practice and later died brought suit under section 1983 and the state wrongful death statute. A federal district court in Mississippi held that

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29. *See* The Yearbook of School Law 1987 at 184, Mahoney v. Adirondack Publishing Co., 509 N.Y.S.2d 193 (App. Div. 1986).
30. Mahoney v. Adirondack Publishing Co., 523 N.Y.S.2d 480 (N.Y. 1987).
31. Poncin v. Arlt, 428 N.W.2d 485 (Minn. Ct. App. 1988).
32. Jones v. Williams, 431 N.W.2d 419 (Mich. Ct. App. 1988).

the eleventh amendment barred an action against the Board of Trustees and that the individual board members had qualified immunity.[33] Thereafter the suit proceeded against the coach, team physician, and trainer. Although the district court held that the plaintiff had stated a claim against these individuals, the Fifth Circuit Court of Appeals reversed.[34] Under Mississippi law, the trainer and team physician were entitled to qualified immunity because they were performing discretionary functions in administering medical treatment. The extension of "discretionary functions" to encompass medical care was done as a policy matter. Additionally, the coach had qualified immunity in this case because he was being sued merely due to his general authority over the program.

In a New York case, a high school football player sustained injury allegedly because he was playing in a mismatched game in a fatigued condition. The team on which the injured student participated had a very poor record. The principal of the school had requested that his team be assigned to a less competitive division because it was clear that his football team was outmatched. However, the league supervisor denied the request. On the day of the injury, the student's team was playing a vastly superior team. The principal and the coach had discussed not playing this game because it had a high risk of injury. However, the game was played, and the student, who had played virtually every down because of a lack of qualified replacements, was injured near the end of the first half. The student prevailed at the state supreme court level. Upon appeal, the lower court decision was affirmed. The school unreasonably enhanced the risk of injury to the student by playing this contest which clearly had a high risk of injury.[35]

At a high school track meet in Pennsylvania, a pole vaulter failed to clear the bar and landed with one foot on the landing mat and one foot off, thus sustaining injury. The student alleged negligence in the failure of the school to conform to applicable guidelines regarding the placement of the landing mat and cushions. The lower court granted summary judgment on the basis of governmental immunity. The appellate court reversed on the basis that there is an issue of fact regarding whether the pole vault unit may be considered permanently fixed to the property (i.e., whether the real property exception to immunity may be applicable).[36]

In a Louisiana case, a volunteer assistant softball coach for a grade school team was injured as he jumped over a chain link fence to retrieve

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33. *See* The Yearbook of Education Law 1988 at 187, Sorey v. Kellett, 673 F. Supp. 817 (S.D. M.s. 1987).

34. Sorey v. Kellett, 849 F.2d 960 (5th Cir. 1988).

35. Benitez v. New York City Bd. of Educ., 530 N.Y.S.2d 825 (App. Div. 1988).

36. Cestari v. School Dist. of Cheltenham Township, 520 A.2d 110 (Pa. Commw. Ct. 1987).

a ball. The court of appeals found no liability for the school district. There was no defect in the fence and the coach simply slipped on the wet grass. Additionally, the coach could have chosen a safer, more easily accessible, alternative route instead of jumping the fence.[37]

A bicyclist in New York hit his head on a cross beam which ran under the press box at a state university's stadium. Although the court of claims found some fault by the defendant, the appellate court reversed. The beam was readily observable by the reasonable use of one's senses.[38]

The next three cases deal with injuries sustained in lockerrooms. In the first case, a high school student was involved in an altercation with another student. The students were in the lockerroom for a school sponsored athletic event. The plaintiff was allegedly provoked by the other student into chasing him. The other student then closed a door upon the plaintiff's hand resulting in the traumatic amputation of the plaintiff's little finger. The failure to supervise in this situation was not actionable under Illinois law because the standard of care is breached only by willful and wanton misconduct. The allegation that other altercations had arisen between students in the past was insufficient to show willful and wanton misconduct.[39]

In a California case, a high school wrestler who was changing clothes in an unsupervised restroom before practice was assaulted by a nonstudent. The California Court of Appeals held that the complaint did state a cause of action against the school district. The plaintiff alleged that the school district failed in its duty of supervision in that the school district was aware or should have been aware that the restroom was unsafe and attacks by nonstudents were likely to occur.[40]

In a rather peculiar case out of Indiana, a female member of a school's swim team was injured in the girls' lockerroom as she was changing her clothes. She was injured as a member of the boys' wrestling team, while engaged in an act of voyeurism, fell through a false ceiling and landed upon the object of his inspection. The plaintiff alleged that the school breached its duty in supervising its students (i.e., that the school failed to supervise a student with a propensity to peep). Notwithstanding the above, the Indiana Court of Appeals did not reach the merits of this matter since plaintiff's claim was dismissed because of a failure to meet the notice requirements of the Indiana Tort Claims Act.[41]

A Kansas case dealt with the duty of a private high school to provide disability insurance for those who participate in interscholastic athletics.

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37. Springer v. St. Bernard Parish School Bd., 521 So. 2d 461 (La. Ct. App. 1988).
38. Poerio v. State, 534 N.Y.S.2d 459 (App. Div. 1988).
39. Holsapple v. Casey Community Unit School Dist. C-1, 510 N.E.2d 499 (Ill. App. Ct. 1987).
40. Leger v. Stockton Unified School Dist., 249 Cal. Rptr. 688 (Ct. App. 1988).
41. Rodgers v. Martinsville School Corp., 521 N.E.2d 1322 (Ind. Ct. App. 1988).

A high school football player was injured during a football game resulting in quadriplegia. The suit which was brought against the high school alleged negligence by the school in: (1) a failure to provide disability insurance for athletes; and (2) a failure to advise the student of the extent of insurance coverage provided. The Kansas Supreme Court held that there was no duty to insure based on the applicability of a Kansas statute which provides that boards of education "may" choose to purchase insurance but does not mandate that insurance be provided. Also, the failure to disclose the extent of insurance actually provided did not increase the risk of injury to plaintiff nor did he rely on the promise by the defendant of disability insurance when he chose to participate in football.[42]

The issue of the legality of public school districts requiring students and their parents to sign releases as a condition of student participation in athletics was addressed by the Washington Supreme Court. The documents in question had language to the effect that there was a release of "liability resulting from any ordinary negligence that may arise in connection with school district interscholastic activities programs." The court engaged in a six-part analysis regarding the obligations of a school district to its constituents before it arrived at the conclusion that the release was invalid as a violation of public policy. In part the court relied upon the fact that the school performs a service of great importance to the public and that the school district has a decisive advantage in terms of its bargaining power. It should be noted, however, that the court left open the issue of the effectiveness of language in the release forms which serves as a warning of inherent risks.[43]

Spectators. A ten-year-old spectator at a teeball game held on school property was injured as she tripped over a cable barrier which was suspended through a series of concrete posts. The child sustained a broken knee and torn ligaments. The Louisiana Court of Appeals held that the fence did not pose an unreasonable risk of injury to the child since the barrier was fully visible and the child had gone over it many times before. The injury resulted from the fact that the child was running and tripped over the barrier.[44]

The next two cases deal with the issue of security at school athletic contests. In a Louisiana case, parents whose son was fatally stabbed while attending a high school football game sued the school board which had rented the stadium to the high school for the contest. The student was stabbed by a third party and there was no history of violence between the schools nor of weapons in the stadium. The Louisiana Court

42. Wicina v. Strecker, 747 P.2d 167 (Kan. 1987).
43. Wagenblast v. Odessa School Dist. No. 105-157-166J, 758 P.2d 968 (Wash. 1988).
44. Lejeune v. Acadia Parish School Bd., 517 So. 2d 1030 (La. Ct. App. 1987).

of Appeals held that the lessor school board had no duty under the terms of the lease to provide security for the event. Additionally, there was no indication of any specific knowledge of potential danger to which the lessor had a duty to respond.[45]

In a case out of Mississippi, a patron of a football game was attacked in the parking lot of the school stadium after the game. The plaintiff brought an action against the school district on the basis that it failed to provide a reasonably safe area from which to leave the stadium. The Fifth Circuit Court of Appeals ruled that this action was barred by Mississippi law regarding sovereign immunity.[46]

EMPLOYMENT

Eighteen cases which dealt with employment issues were decided in 1988. Seven of those cases involved adverse employment decisions, three concerned contract disputes, three were based on race discrimination, two dealt with sex discrimination, and three cases pertained to first amendment issues.

Adverse Employment Decisions

General. In a five-to-four decision, the United States Supreme Court spoke to the issue of whether the NCAA is to be considered a "state actor." The NCAA had ordered a state university (UNLV) to suspend its basketball coach following extensive violations of NCAA rules. The coach, Jerry Tarkanian, sought injunctive relief alleging violations of section 1983. The Nevada Supreme Court held that the actions of the NCAA were "state actions" and that procedural due process was required.[47]

The High Court reversed this ruling finding that the NCAA's participation did not constitute state action. The university's decision to adopt the NCAA's rules did not make them state rules, since UNLV retained the power to withdraw from the NCAA. Furthermore, there was no delegation of government power from UNLV to the NCAA.[48] The dissent, written by Justice White, took the position that the NCAA acted jointly with UNLV in suspending Tarkanian, thereby becoming a state actor.[49] The dissent relied upon *Dennis v. Sparks*[50] as precedent for this proposition.

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45. St. Pierre v. Lombard, 512 So. 2d 1206 (La. Ct. App. 1987).
46. Boyd v. Gulfport Mun. Separate School Dist., 821 F.2d 308 (5th Cir. 1987).
47. *See* The Yearbook of Education Law 1988 at 190, Tarkanian v. NCAA, 741 P.2d 1345 (Nev. 1987).
48. NCAA v. Tarkanian, 109 S. Ct. 454 (1988).
49. *Id.* at 466.
50. Dennis v. Sparks, 449 U.S. 24 (1980).

Refusal to Renew Coaching Contract. A California high school baseball coach who was tenured as a teacher did not have his coaching contract renewed. He had held this coaching position for the past seven years. His suit against the school district was based on a deprivation of his constitutionally protected property and liberty rights in his coaching position. The Ninth Circuit Court of Appeals found that there was no protectible property interest involved. The plaintiff did not have tenure in his coaching assignment nor was there any "custom" of creating tenure for coaches. Also, there was no liberty interest involved since there was no stigma attached to the nonrenewal.[51]

In a case out of Wyoming, the contract of a high school basketball coach was not renewed. Although the depositions of the board members revealed that there was discussion in an executive session regarding the plaintiff's excessive profanity and abuse of players, the board gave no reasons publicly for the nonrenewal of the contract. The plaintiff sued the school district based on a deprivation of his liberty interests without due process. The jury awarded the plaintiff $33,000. However, the district court granted the defendant's motion for judgment notwithstanding the verdict. The court cited *Board of Regents of State Colleges v. Roth*[52] for the proposition that the plaintiff in order to prevail needed to show a "stigma plus." Since the plaintiff still retained employment with the defendant, there was no violation of a liberty interest.[53]

Two probationary high school teachers sued the county board of education for a refusal to renew their teaching contracts. They were not rehired since they were no longer needed to serve as assistant football coaches because a new head football coach had been hired. Both teachers were originally hired based on their ability to coach football. They were both teaching mathematics although neither had teaching experience in that area. The North Carolina Court of Appeals held that the defendant did not act arbitrarily or capriciously in refusing to renew their teaching contracts because of a head coaching change. The new head coach should be entitled to flexibility in developing his own staff.[54]

Resignation. In a Kansas case, two tenured teachers sought an injunction against the school board to reinstate them as full-time teachers. Both of these teachers had served as junior high school coaches pursuant to supplemental contracts. When they resigned their coaching duties the board also reduced their teaching contracts from full time to six-sevenths on the basis that the last period of the day which they had taught was really a part of their coaching contract since this period was used as

51. Lagos v. Modesto City Schools Dist., 843 F.2d 347 (9th Cir. 1988).
52. Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972).
53. Diehl v. Albany County School Dist. No. 1, 694 F. Supp. 1534 (D. Wyo. 1988).
54. Abell v. Nash County Bd. of Educ., 365 S.E.2d 706 (N.C. Ct. App. 1988).

practice time for junior high teams. Thus, the board took the position that this class was a part of the teachers' supplemental contracts. The Kansas Supreme Court disagreed and found for the teachers. The plaintiffs were within their rights to resign their supplemental contracts without affecting their primary teaching duties.[55]

Neglect of Duty. A tenured teacher who was also the cheerleader sponsor was dismissed for neglect of duty after she allowed the cheerleaders to drink beer at their hotel room and also drank beer with them. The Colorado Court of Appeals upheld the dismissal.[56] The Colorado Supreme Court affirmed this ruling finding that it was within the school board's discretion to dismiss her under these circumstances.[57]

In a commentary regarding the importance of interscholastic athletics, a teacher was dismissed for her alleged misconduct in refusing to return to her teaching duties. The plaintiff, an English teacher, had the school's star basketball player in her early morning class. The player had a number of absences in her class and she reported this to the principal. She assigned makeup work to the player, which he did not complete, and he continued to miss class. At the end of the grading period she gave the player the grade of "F." Thereafter, she received numerous threats to her safety from community members and athletic department personnel because of the grade given to the star player. Finally, the principal asked her to change the grade in exchange for a good teaching evaluation. The plaintiff, in severe emotional distress, changed the grade to a "D-" and left the building. The plaintiff then sought treatment from a psychiatrist and was unable to return to her teaching duties. Although the superintendent knew that she was under psychiatric treatment, he suspended her for not returning to work and then discharged her for dereliction of her duties. The Supreme Court of Tennessee found that the teacher was not guilty of misconduct and ordered her reinstatement.[58]

Contract Disputes

In a case out of Minnesota, a tenured associate professor who served as the recreational sports director at a university challenged his termination as a violation of his constitutional rights and a breach of contract. There was extensive evidence to show that the plaintiff misused the university's personnel, name, and resources. Pursuant to the Tenure Code a hearing was held at which the due process rights of the plaintiff

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55. Hachiya v. Board of Educ., Unified School Dist. No. 307, Salina County, 750 P.2d 383 (Kan. 1988).

56. *See* The Yearbook of School Law 1987 at 192, Blaine v. Moffat County School Dist. No. 1, 709 P.2d 745 (Colo. Ct. App. 1985).

57. Blaine v. Moffat County School Dist. No. 1, 748 P.2d 1280 (Colo. 1988).

58. McGhee v. Miller, 753 S.W.2d 354 (Tenn. 1988).

were fully protected. The plaintiff argued that even if his dismissal as recreational sports director was warranted, he should not also lose his position as associate professor. The Eighth Circuit Court of Appeals disagreed with the plaintiff since it found that the character defects disclosed by his conduct would also impair his ability to perform as a faculty member.[59]

In a Kentucky case, a sports broadcaster sued the NCAA for intentional interference with prospective contractual relations. The NCAA, in asserting its right to approve announcers for the broadcasting of NCAA televised football contests, did not approve of the plaintiff, thus preventing him from announcing NCAA games. The Kentucky Supreme Court held that the NCAA used this right of approval in good faith. There was evidence to show that the plaintiff was more strongly identified with professional football than with collegiate football. Additionally, the plaintiff had been suspended from professional football for gambling offenses and he has a well-known reputation as a playboy. These were all legitimate reasons for the NCAA to object to his announcing NCAA games.[60]

A tenured physical education teacher was denied reappointment as the varsity football coach. The collective bargaining agreement had a provision that no teacher shall be deprived of a "professional advantage without just cause." The coach went to arbitration on the basis of this clause. The court held that there could be arbitration regarding the manner in which teacher evaluations were conducted but that the above clause related to a nondelegable duty of the board to assess the qualifications of coaches and was thus not subject to arbitration.[61]

Discrimination

Race. The first race discrimination case was a request for a rehearing by the Fifth Circuit Court of Appeals on the issue of the applicability of the doctrine of respondeat superior in a section 1981 action. In this case a white coach, a minority at his school, had brought a race discrimination suit. The Fifth Circuit Court of Appeals had ruled that the plaintiff had established a prima facie case of discrimination. It also ruled that respondeat superior was inapplicable in a section 1981 claim to impose liability upon the school district.[62] At this time the court

59. Mueller v. Regents of Univ. of Minn., 855 F.2d 555 (8th Cir. 1988).

60. NCAA *ex rel.* Bellarmine College v. Hornung, 754 S.W.2d 855 (Ky. 1988).

61. Riverhead Cent. School Dist. v. Riverhead Cent. Faculty Ass'n, 528 N.Y.S.2d 611 (App. Div. 1988).

62. *See* The Yearbook of School Law 1987 at 193, Jett v. Dallas Indep. School Dist., 798 F.2d 748 (5th Cir. 1986).

denied the athletic director's and coach's motion for a rehearing thus reaffirming its position regarding respondeat superior.[63]

In a case out of Alabama, a black male basketball coach was removed from his coaching duties. He alleged that he was removed from his position because of racial discrimination. The federal district court agreed finding that the removal of the coach based on his win-loss record and the availability of an allegedly more qualified coach were mere pretexts for discrimination. There were a number of other coaches in the school system who also had poor win-loss records but were retained. Also, the evidence clearly showed that the principal did everything possible to undermine the plaintiff's authority and to show favoritism to the white coach who was to succeed the plaintiff.[64]

A black male physical education teacher who also coached the eighth grade football team alleged racial discrimination when he was temporarily transferred to the transportation department and then reassigned to teach secondary science. He was also relieved of his coaching responsibilities. In this situation, the federal district court in Texas found that the transfers were not precipitated by racial discrimination. The plaintiff was transferred and removed from coaching after he tackled a student-athlete. It was within the discretion of the school district to temporarily reassign him to nonteaching duties since his contract had no provision limiting the school district's right to modify his duties.[65]

Sex. In a case out of Minnesota, a female assistant softball coach brought a sex discrimination action against the university when it failed to promote her to full-time status. The plaintiff had been a part-time softball coach at the university since 1977. In 1983 she requested that she be given full-time status, but the request was denied. There were similar requests from other part-time coaches at that time and the university did grant full-time status to the male assistant coach of women's gymnastics. The plaintiff alleged that the consent decree which existed due to a prior sex discrimination suit was violated since the university did not use written, sex-neutral criteria to make the decision regarding her full-time appointment. The Eighth Circuit Court of Appeals found her arguments unpersuasive. The decision made here was a programmatic and budgetary decision which did not require the use of the criteria set forth in the consent decree.[66]

A female physical education teacher sued the school district to recover for the allegedly discriminatory denial of her application for the position of athletic director. In this title VII case, the defendant school

63. Jett v. Dallas Indep. School Dist., 837 F.2d 1244 (5th Cir. 1988).
64. Jackson v. Birmingham Bd. of Educ., 695 F. Supp. 1164 (N.D. Ala. 1988).
65. Dooley v. Fort Worth Indep. School Dist., 686 F. Supp. 1194 (N.D. Tex. 1987).
66. Sennewald v. University of Minn., 847 F.2d 472 (8th Cir. 1988).

district argued that the position for which the plaintiff applied was not "available" since the position was not simply athletic director but rather head football coach/athletic director, a position for which she was clearly not qualified. The Mississippi federal district court found that this "combined" position was simply an impermissible preference which unlawfully excluded the plaintiff from consideration for the position of athletic director.[67]

First Amendment Issues

In this case which was heard by the Circuit Court of Appeals in the District of Columbia, a former athletic director sued the university to challenge his termination. He alleged that his termination violated his rights of free speech. The plaintiff was hired in 1983 to bring the university into full compliance with NCAA rules. As time went on, the plaintiff spoke openly regarding various violations of NCAA rules much to the chagrin of the university president and the board of trustees. The court relied upon *Pickering v. Board of Education*[68] and *Connick v. Myers*[69] as precedent in arriving at its decision. First, it is obvious that the matters about which the plaintiff spoke are matters of public concern. However, the plaintiff was considered to be a "policy level official" at this university. Thus, the university had an important interest in showing that the plaintiff was indeed compatible with the president and the board of trustees. He therefore can be dismissed for expressing views that display a policy disagreement with his superiors because there would be a question of his ability to carry out the policy choices of his superiors in a vigorous manner.[70]

A high school teacher in Indiana was dismissed from his teaching position allegedly in retaliation for statements he made to the local newspaper regarding his dissatisfaction with the school board's decision to replace him as basketball coach. The Seventh Circuit Court of Appeals looked to the *Connick* decision to resolve this matter. The statements made by the plaintiff were solely to make a self-serving point about his termination as basketball coach. They were related to a matter of personal concern and thus did not fall into the realm of constitutionally protected speech. The appellate court affirmed the district court's ruling which granted the defendant's motion for summary judgment.[71]

In a case from Arkansas, a nonprobationary teacher appealed from a

67. Wynn v. Columbus Mun. Separate School Dist., 692 F. Supp. 672 (N.D. Miss. 1988).
68. Pickering v. Board of Educ., 391 U.S. 563 (1968).
69. Connick v. Myers, 461 U.S. 138 (1983).
70. Hall v. Ford, 856 F.2d 255 (D.C. Cir. 1988).
71. Vukadinovich v. Bartels, 853 F.2d 1387 (7th Cir. 1988).

decision of the school board not to renew his teaching contract because of insubordination. The teacher had been belligerent at faculty meetings and in private meetings with the principal. However, the plaintiff alleged that the real reason for his dismissal was the statements he made in class regarding the lack of black cheerleaders at the school. The Arkansas Court of Appeals held that even if the statements made in class were constitutionally protected, the evidence showed that the failure to renew his contract related directly to his insubordinate and belligerent behavior.[72]

MISCELLANEOUS

The miscellaneous category includes three cases which deal with public records and one case concerning collective bargaining.

Public Records

Broadcasters and newspapers brought an action against the NCAA and the Southwest Athletic Conference to compel disclosure of information relating to the misconduct of member institutions. Two universities which wished to intervene in the action were denied permission to do so.[73] The Fifth Circuit Court of Appeals held that the NCAA and the Southwest Athletic Conference were not governmental bodies. Therefore, they were not subject to the requirements of the Texas Open Records Act. The district court's ruling for the plaintiffs was reversed.[74]

In Oklahoma, news media sought access to a letter of inquiry which was sent from the NCAA to Oklahoma State University. The issue was whether the media had a first amendment right of access to the letter. The federal district court held that there was no tradition of access in this state to the letter and that such access would not play a positive role in the ongoing investigation. The defendant's motion to dismiss was granted.[75]

A Texas newspaper sought a writ of mandamus to compel the president of Texas A & M University to disclose information regarding the recruitment of a high school athlete. The president had not acceded to the newspaper's request to disclose such information nor had he, as required under Texas law, sought the attorney general's opinion regarding disclosure. This failure to do so led to a presumption that the material

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72. Caldwell v. Blytheville Ark. School Dist. No. 5, 746 S.W.2d 381 (Ark. Ct. App. 1988).

73. *See* The Yearbook of Education Law 1988 at 195, Kneeland v. NCAA, 806 F.2d 1285 (5th Cir. 1987).

74. Kneeland v. NCAA, 850 F.2d 224 (5th Cir. 1988).

was public. The Texas Court of Appeals therefore affirmed the issuance of the writ of mandamus.[75]

Collective Bargaining

The organizers of a group of college basketball officials petitioned the Third Circuit Court of Appeals for a review of the National Labor Relations Board decision that the Big East Athletic Conference did not violate the National Labor Relations Act in its refusal to bargain with the group of officials. The court found substantial evidence to support the finding that the officials acted as independent contractors. Therefore, for the purposes of the Act they are not employees and the refusal to bargain with them is not an unfair labor practice.[76]

75. Combined Communications Corp. of Okla., Inc. v. Boger, 689 F. Supp. 1065 (W.D. Okla. 1988).

76. Vandiver v. Star-Telegram, Inc., 756 S.W.2d 103 (Tex. Ct. App. 1988).

77. Collegiate Basketball Officials Ass'n, Inc. v. NLRB, 836 F.2d 143 (3d Cir. 1987).